

INTERIOR BOARD OF LAND APPEALS

Shirley Nielsen

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SHIRLEY NIELSEN

IBLA 2000-265

Decided December 3, 2002

Appeal of a decision by the Alaska State Office, Bureau of Land Management, conforming Native allotment to survey. AA-6211, Parcel B.

Reversed and remanded.

1. Administrative Authority: Generally--Alaska:  
Native Allotments--Alaska National Interest Lands  
Conservation Act: Duty of Department of the  
Interior to Native Allotment Applicants

Where an Alaska Native filed an application for allotment in 1970, and BLM substituted a lot for a parcel she claimed in her application and thereby rejected her claim without notification to her of the reasons for the proposed rejection of her original claim, and without granting her the ability to submit written evidence or request a hearing or adjudication, BLM has improperly deprived her of a property interest in her Native allotment application without due process of law.

2. Administrative Authority: Generally--Alaska:  
Native Allotments--Alaska National Interest Lands  
Conservation Act: Duty of Department of the  
Interior to Native Allotment Applicants

Application of the principle of administrative finality involves jurisprudential rather than jurisdictional considerations. The doctrine of administrative finality will not be invoked where to do so would result in a manifest injustice.

3. Alaska: Native Allotments--Alaska National Interest Lands  
Conservation Act: Native Allotments

Pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1994), where a protest has been filed to an amended land description submitted by a Native allotment applicant to change a previous

land description so as to correctly reflect the land originally intended, BLM must adjudicate the amended application to determine whether or not the requirements of the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), have been met with respect to the amended application. Only after this adjudication has been completed may section 905(b) of ANILCA, 43 U.S.C. § 1634(b) (1994), be invoked to resolve conflicts between overlapping Native allotment applications.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Statutory Construction: Generally

Section 905(b) of ANILCA, 43 U.S.C. § 1634(b) (1994), requires BLM to exercise its discretion to eliminate conflicts between two or more allotment applications which exist due to overlapping land descriptions. Neither section 905(b) of ANILCA nor its legislative history permits BLM to mandate agreement where there is none, and any agreement accepted by BLM must be, to the extent practicable, consistent with prior use of the allotted lands and beneficial to the affected parties.

5. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where a Native allotment applicant has relinquished her claim, and the applicant provides convincing evidence that she relinquished a parcel in her allotment application as a result of duress and misrepresentation, which evidence is supported by the record as a whole, the relinquishment may be found to be involuntary and unknowing, and a violation of her right to due process of law.

APPEARANCES: Samuel J. Fortier, Esq., Anchorage, Alaska, for appellant; Daniel Roehl, Kokhanok, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Shirley Nielsen appeals from a May 2, 2000, decision of the Alaska State Office, Bureau of Land Management (BLM), entitled "Native Allotment Conformed to Survey." The decision relocates Nielsen's Native Allotment application, AA-6211, Parcel B,

consisting of 40 acres, by substituting a landlocked parcel for the waterfront parcel for which she originally applied. It awards the parcel for which Nielsen originally applied to Daniel Roehl, who claims an interest in the parcel by virtue of an amended allotment application. By order dated July 21, 2000, the Board stayed BLM's decision pending resolution of the appeal on its merits.

The dispute between Roehl and Nielsen has openly existed since July 1985, and the disputed parcel has been the subject of various Departmental decisions since December 1985, including a Board decision in Daniel Roehl, 103 IBLA 96 (1988). For the reasons set forth below, we reverse the May 2, 2000, decision and remand the case to BLM for adjudication with respect to Nielsen's protest against Roehl's effort to amend his application to include the disputed 40-acre allotment.

#### Legal Background

For all time periods relevant to this appeal, the Alaska Native Allotment Act (Act of May 17, 1906), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed subject to the savings provision in section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1994), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Forest Service, U.S. Department of Agriculture, 143 IBLA 175, 177-78 (1998). 1/ On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487. Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1994), provided automatic legislative approval of pending Native allotment applications in certain circumstances:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906, \* \* \* which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska \* \* \* are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by

1/ Section 18 of ANCSA, enacted December 18, 1971, 43 U.S.C. § 1617 (1994), expressly repealed the Act of May 17, 1906, but preserved applications for Native allotments pending on its 1971 date of enactment.

\* \* \* this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section \* \* \*.

43 U.S.C. § 1634(a) (1) (1994).

Section 905(b) of ANILCA required the Secretary to adjust Native allotment boundaries in situations of "[c]onflicting land descriptions in applications."

Where a conflict between two or more allotment applications exists due to overlapping land descriptions, the Secretary shall adjust the descriptions to eliminat conflicts, and in so doing, consistent with other existing rights, if any, may expand or alter the applied-for allotment boundaries or increase or decrease acreage in one or more of the allotment applications to achieve an adjustment which, to the extent practicable, is consistent with prior use of the allotted land and is beneficial to the affected parties \* \* \*.

43 U.S.C. § 1634(b) (1994).

In addition to prohibiting legislative approval where allotments conflicted under section (b), section 905(a) (5) also prohibited legislative approval where amendments to allotment applications are in dispute under section 905(c). Id. at § 1634(a) (5). Section (c) provides for amendments to Native allotment applications and protests of those amendments:

An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. \* \* \*

43 U.S.C. § 1634(c) (1994). A proviso required the Secretary to notify the State of Alaska and any other interested party of the proposed amendment and permitted any such party to file a protest against the amendment of the Native allotment application, subject to adjudication under section 905(a) (5) (C). Id.

#### Factual and Procedural Background

The full chronology of past events involving both the Nielsen and Roehl allotment applications is necessary for resolution of this appeal. We will refer to the disputed parcel as "Parcel B." Parcel B is located on Sid Larson Bay in the S1/2 SE1/4 SW1/4 sec. 3 and the N1/2 NE1/4 NW1/4 sec. 10, T. 9 S., R. 31 W., Seward Meridian. Sid Larson Bay branches off the

Kakhonak Bay to the southeast, which in turn branches off Iliamna Lake near Anchorage, Alaska.

A. Proceedings before BIA and BLM

Daniel Roehl signed initial Native allotment application A-052690 on July 25, 1960, for 20 acres of land located near Anchorage in the S1/2 SE1/4 SE1/4 Sec. 3, T. 11 N., R. 3 W., Seward Meridian. In response to a BLM request, on September 22, 1965, Roehl submitted an Alaska Native Allotment Evidence of Occupancy form, alleging use and occupancy of 12.5 acres of this 20-acre tract by virtue of cultivation of the land, berry-picking and hunting, and construction of a house. Roehl had apparently restricted his showing to 12.5 acres based upon a BLM letter, dated April 30, 1962, advising him that a portion of the 20-acre tract for which he had applied was withdrawn by Public Land Order No. 576, March 27, 1959.

On December 20, 1966, the Bureau of Indian Affairs (BIA) filed with BLM a standard form notice on behalf of Roehl. This form stated that the undersigned applicant "was told about the new Native allotment regulations (43 CFR 2212.9)" which permitted applicants to amend their applications to include additional separate tracts that they actually use, up to 160 acres. Roehl signed this document to state that he would submit an amended application for additional tracts of land "as soon as [he could] properly stake the lands and describe them."

The record contains a report, dated April 28, 1967, regarding the 12.5 acres which were the subject of Roehl's original application A-052690. The BLM report, based on an April 4 field examination, recommended that Roehl be given a final certificate and patent for that acreage. On October 31, 1967, BLM advised Roehl that, because BLM's 1962 letter to him had been inaccurate, he could make a showing for the entire 20-acre plot he originally applied for. He did so by filing a new Alaska Native Allotment Evidence of Occupancy form on November 20, 1967.

On February 28, 1968, BLM sent a memorandum to BIA demanding to know whether, consistent with his 1966 form notice, Roehl actually intended to amend application A-052690. On March 20, 1968, BLM received from BIA an amendment, dated February 27, 1968, to Roehl's 1960 application. This amended application added 140 acres, more or less, of land in secs. 3 and 10, T. 9 S., R. 31 W., Seward Meridian. Roehl's application claimed occupancy of lands which lie south of and contiguous to an allotment application filed by his wife, Nellie Roehl, on September 1, 1967. The amended application described the following lands:

Beginning at a point on the North shore of the most easterly arm of Sid Larson Bay (approx. Lat. 59°25'16" N., Long. 154°28'47" W); thence south across said arm of Sid Larson Bay to the place and true point of beginning Cor. # 1; thence south approx. 36 chains to Cor. # 2; thence east 40 chains to Cor. # 3; thence north approx. 34 chains to Cor. # 4; being common to Cor. # 4 of Nellie N. Roehl's native allotment application; thence west approx. 28 chains to Cor. # 5 being common to Nellie N. Roehl's Cor. # 5; thence westerly along the meandering southerly shoreline of said arm of Sid Larson Bay to the true point of beginning, containing approximately 140 acres more or less.

(Protracted T. 9 S., R. 31 W., S.M. - Iliamna (B-4) Quad.)

Thus, from the outset, Daniel Roehl sought to obtain an additional 140-acre tract abutting on and south of the land applied for by Nellie Roehl. 2/ Nellie Roehl's allotment was located northeast of the easternmost end of Sid Larson Bay. Roehl's application shared a common line, between corners 4 and 5, with his wife's allotment, AA-2714, and proceeded to cover lands south of that line in the southeast portion of the easternmost arm of Sid Larson Bay.

On May 13, 1969, BLM issued a decision rejecting Roehl's amended application, identifying the 140-acre tract as Tract II. 3/ Therein, citing "32 FR 3338," BLM asserted that the land had been "segregated from all forms of appropriation under the public land laws, excepting the mining laws," on March 8, 1967. (BLM Decision dated May 13, 1969.) 4/ In addition, BLM

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2/ Roehl testified that his wife grew up on the lands on which the allotment subsequently awarded to her was located. See Affidavit of Daniel Roehl, filed with Roehl's Statement of Reasons in IBLA 86-278, ¶ 3.

3/ Because BLM referred to the land subject to Roehl's amended application for the 140-acre tract as both Parcel B and Tract II of A-052690, we will refer to it as Tract II, to avoid confusion with Parcel B of Nielsen's application.

4/ While the BLM decision cited the Federal Register at 32 FR 3338, the correct citation was 32 FR 3838, which involved Multiple Use Classification (MUC) AA-818. MUC AA-818 segregated lands within T. 9 S., R. 31 W., Seward Meridian, from further appropriation, with certain exceptions. Secs. 3 and 10 were not subject to any of these exceptions, and were therefore segregated from appropriation under the Act of May 17, 1906. See 32 FR 3838

¶ 4. Every BLM citation to MUC AA-818 within the record, both with respect to Roehl and Nielsen, identifies the incorrect page number of the Federal Register and is hereafter corrected in this decision.

cited Recreation and Public Purposes Order Nos. 142, July 17, 1961, and AA-557, November 30, 1966, as prohibiting Roehl's amended application with respect to Tract II, because such classifications segregate the land from all forms of appropriation. BLM concluded that Roehl's use and occupancy from September 1, 1967, began at a time that the lands were segregated from use and rejected the application with respect to Tract II.

Roehl notified BLM on June 13, 1969, that he could not appeal in the time allowed because he was unable to "commute to Anchorage from [his] out of town job." Instead, he stated that he intended to submit a second amendment "for additional acreage at a later date."

BIA submitted Roehl's second attempt to amend his allotment application, dated February 6, 1970, to BLM on March 26, 1970. Except for spelling out words that had been abbreviated, Roehl's description of the land within Tract II, claimed in his February 1970 application, was identical to that in the March 1968 application. However, Roehl alleged an initial occupancy date of June 1960, prior to the effective dates of the land classification orders cited in BLM's 1969 decision rejecting the application.

BLM expressed skepticism at this date change. On April 2, 1973, the Bristol Bay Area Manager signed a memorandum to the Chief Adjudicator "recommend[ing] rejection of [Tract II] because we can't allow arbitrary and capricious changing of dates after due process has been afforded the applicant." In a December 6, 1973, letter to BLM, BIA explained that the September 1, 1967, date of occupancy was in error, and requested that the application be processed.

On March 8, 1970, within approximately one month of Roehl's submitting his second amended application, Shirley Nielsen signed Native allotment application AA-6211 under the provisions of the Act of May 17, 1906, as amended; she submitted this application to BIA. Nielsen applied for four 40-acre parcels of land, designated Parcels A through D, which Nielsen averred that she had occupied since 1956 for traditional Native uses, including fishing, hunting, and berry-picking. According to plat maps current to March 29, 1971, Parcels A and C were located in secs. 30 and 29, respectively, of unsurveyed T. 9 S., R. 34 W., Seward Meridian. Parcel D was located in sec. 8, unsurveyed T. 8 S., R. 31 W., Seward Meridian. Parcel B was located in secs. 3 and 10, unsurveyed T. 9 S., R. 31 W. Parcel B is identified in Nielsen's application as follows:

Beginning at approximately Longitude 154°28' West, Latitude 59°25'8" North, at the Southeast Corner of unsurveyed Section 3, Township 9 South, Range 31 West, Seward Meridian; thence West ½ mile; thence South 660

feet to Corner No. 1 and the true point of beginning; thence West 1320 feet to Corner No. 2; thence North 1320 feet to Corner No. 3; thence East 1320 feet to Corner No. 4; thence South 1320 feet to Corner No. 1 and the true point of beginning and alsodescribed [sic] as fractional S1/2SE1/4SW1/4 of unsurveyed Section 3 and N1/2NE1/4NW1/4 of unsurveyed Section 10, Township 9 South, Range 31, West, Seward Meridian, containing 40 acres, more or less.

According to the four plat maps depicting the parcels, all of the above-described township sections were, in 1971, subject to MUC AA-818, and an Alaska Native protest, AA-872. On March 1, 1971, the Acting Superintendent of the BIA certified the application and on March 3, 1971, forwarded it to BLM.

Nielsen's application AA-6211, Parcel B, depicted land in the same sections, though not on the same location, as Roehl's second amended application. His 140-acre tract was depicted on a map attached to his amended application as being located in a portion of the NE 1/4 sec. 10, and the SE 1/4 sec. 3. By contrast, Nielsen's application for Parcel B asserted that Parcel B was located exclusively within the NW 1/4 sec. 10, and SW 1/4 sec. 3.

On June 27, 1972, the Chief Adjudicator, BLM, requested the District Manager to produce a field report for Nielsen's allotment. The request noted potential conflicts between Nielsen's allotment and Native allotment application A-052510 (filed by Simeon Zackar) to the immediate west, as well as with Roehl's allotment to the immediate east. A map attached to the request depicted Nielsen's allotment (AA-6211), as well as the three allotments applied for by Nellie Roehl (AA-2714), Daniel Roehl (A-052690), and Zackar (A-052510). <sup>5/</sup> The map showed Nellie Roehl's allotment to be located northeast of the eastern-most arm of Sid Larson Bay. Daniel Roehl's allotment was located due south of Nellie Roehl's covering the southeast arm of the bay. The map depicted both Roehl applications as having a western border down the middle of secs. 3 and 10. The map showed Nielsen's allotment as having a common eastern border with Daniel Roehl's western border, as depicted in her allotment application. Finally, it showed Nielsen's application as overlapping at its western portion with the eastern portion of Zackar's allotment, on the southern edge of Sid Larson Bay.

William "Ken" Stowers, BLM Realty Specialist, conducted a field examination on June 24, 1975, accompanied by Nielsen's husband, John Nielsen. Stowers issued findings and conclusions

<sup>5/</sup> The spelling of this name appears in the record as "Zachar" and "Zackar."

in a field report dated January 21, 1976. Stowers found no conflict with other allotment applications, stating:

The applicant had blazed a 6" d.b.h. spruce as corner No. 1 in common with the boundary of A-052690, Daniel Roehl (see photo 2). BLM left an aluminum tag on this tree and painted it orange. BLM also left a marker on the tree marked for A-052510, Simeon Zackar, which is on a more or less north-south line with corner No. 4 of the subject parcel, AA-6211 B. See photos 1 and 4.

(1976 Field Report at Part II.) The field report described the parcel as follows:

Beginning at corner No. 1 on the mean high-water mark of Sid Larson Bay (Lake Iliamna) near the marker left by BLM (see photos 2,3,4) in common with the northwest corner of A-052690, Native allotment; thence south ±18 chains to corner No. 2; thence west 20 chains to corner No. 3; thence north ±20 chains along the common boundary with A-052510, Native allotment, to corner No. 4; on the mean high-water mark of Sid Larson Bay; back to the point of beginning.

The field report noted improvements on the parcel, including a campsite and tent frame, and indicated that Nielsen's husband had knowledge of her use of the land to pick berries, hunt and fish, in accordance with traditional custom. Stowers concluded:

On the basis of the improvements and familiarity with the land, it appears that the applicant has been using this area for a number of years. In accordance with the traditional Native subsistence life style, it can be concluded that the applicant uses the parcel in its entirety.

(1976 Field Report at Part III.) The BLM Acting Area Manager and Acting District Manager concurred in the findings and conclusions of the field report in July 1976.

A topographic map attached to the Nielsen field examination report shows Sid Larson Bay, which branches off Kakhonak Bay to the southeast, extending an easternmost neck or narrow slough to the east and south. A sketch map attached to Stowers' field report diagrams the three allotments--Zackar's (A-052510), Nielsen's, and Daniel Roehl's--abutting the south portion of the bay and slough. Roehl's allotment is shown as encompassing the narrow, easternmost neck. Nielsen's allotment is shown abutting Daniel Roehl's to the west, running west 20 chains to the Zackar

boundary. <sup>6/</sup> It is clear from Stowers' depiction of the Nielsen boundaries on Photo 4 that Parcel B of Nielsen's allotment had more and wider waterfront access than Roehl's Tract II, which extended to and past the east end of the bay and slough. Subsequent to receipt of Stower's field report, BLM believed that any conflict involving Parcel B would be between Nielsen and Zackar. (Memorandum to case file dated May 21, 1979.)

Turning back to proceedings regarding Roehl's allotment, the Chief Adjudicator requested a field examination of Tract II on December 30, 1974. For reasons related to questions regarding the mineral character of the original 20-acre parcel near Anchorage, for which he applied in 1960, the field examination of Tract II was not conducted until June 26, 1978. Roehl was present during the field examination. Maps attached to the field examination report show that Carl Neufelder, BLM Realty Specialist, and Roehl examined the tract on the southeast border of the easternmost end of Sid Larson Bay, due south of Nellie Roehl's application AA-2714. Neufelder reported and photographed a cabin, campsite, and temporary shelter, as improvements. The report did not suggest any dissatisfaction on Roehl's part with the examination.

Daniel Roehl identified the claimed lands which had been described correctly on the application. A corner marked No. 5 on AA-2714 [the Nellie Roehl allotment] was found, which is located as shown on the sketch map. This corner is common with corner No. 1 of Daniel Roehl's A-052690-B. A landing was made in the vicinity of Daniel Roehl's improvements and that area was searched on the ground by foot.

(Neufelder Field Report dated May 3, 1979, at 2 (emphasis added).)

According to Neufelder's report, Nellie Roehl's corner No. 5 "on a 10" DBH spruce with tag and flagging is common with corner No. 1 on Daniel Roehl's Native allotment." In a sketch map attached to the Roehl field report, similar to that attached to the Nielsen field report, Roehl's allotment is shown as encom- passing the narrow, easternmost neck of Sid Larson Bay and the eastern slough, and extending along a creek running into it. The report attaches photographs, showing both an "old and new cabin on south side of creek which flows into east arm of Sid Larson Bay," with pictures of Roehl in front of the new cabin. The pictures show the cabins as located at the point at which the

<sup>6/</sup> A chain equals 66 feet. Manual of Surveying Instructions, BLM, section 2-1 (1973). Thus, Nielsen's allotment was plotted along its east/west axis as the 1320 feet between the Zackar and Roehl boundaries.

creek meets the end of the bay/slough. <sup>7/</sup> The report found that Roehl had "made substantial use and occupancy of this parcel in a manner potentially exclusive of others"; it was approved by the Area and District Managers on May 4, 1979.

On September 21, 1979, BLM issued a "filmcard" of T. 9 S., R. 31 W., Seward Meridian. This film showed Nielsen's and Roehl's boundaries to be common, and a conflict between Nielsen's western and Zackar's eastern boundary. Nielsen herself resolved any conflict with Zackar by accepting Zackar's eastern boundary as the common border between them in a written memorandum dated May 30, 1979. Based on Nielsen's concurrence, an April 2, 1982, memorandum states that field reports relating to Zackar's and Nielsen's allotments "do not show them in conflict. Please replat according to reports."

On December 7, 1979, Roehl's Tract II was subject to a "request for survey." On October 16, 1981, the State of Alaska withdrew certain protests affecting both parcels of Roehl's allotment. In early 1982, correspondence from Senator Ted Stevens showed that Roehl had contacted him stating a desire to obtain funds for a resort on Tract II. On May 10, 1982, BLM approved the survey instructions for Roehl's Tract II, which was assigned U.S. Survey No. 7128. Effective August 20, 1982, BLM issued the certificate of allotment, No. 50-82-0099, to Roehl for his 20-acre parcel near Anchorage.

On July 16, 1982, BLM issued a letter to Nielsen stating that, pursuant to section 905(a) of ANILCA, all four of her parcels, including parcel B, were legislatively approved. This letter stated that if an amended land description was not filed with BLM within 60 days the office would order survey of the parcels, and that the "allotment cannot be changed after we have issued the request for survey." BLM stated that the certificates could be issued, but that it would notify Nielsen when the plats for survey were complete, which could take years. BLM issued the request for survey on November 19, 1982.

To summarize the state of affairs in 1982, Nielsen had been told by BLM that all four tracts in AA-6211 had been approved legislatively by ANILCA section 905(a). BLM had given Roehl a

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<sup>7/</sup> The record contains two aerial pictures which together depict Roehl's allotment as being located to the south of the eastern-most portion of the slough and south of the creek. ("Aerial view of parcel looking west into Sid Larson Bay"; "Aerial view of parcel looking south.") On the former of these two pictures a person has drawn a circle identifying "approximate corner #2 in common with AA-6211." This circle is a short distance down the slough from the stream. These pictures thus indicate that Neufelder's report was premised on the assumption that Roehl's Tract II bordered Nielsen's Parcel B at the eastern end of the slough.

certificate of allotment for his 20-acre tract near Anchorage. BLM had submitted "requests for survey" of Nielsen's Parcel B and Roehl's Tract II. Nielsen's husband and Roehl had accompanied BLM on their respective field examinations and expressed no concern at the location of the tracts, identified to be side-by-side.

On August 11, 1983, the Chief of Survey Planning made the following notation on the file of U.S. Survey No. 7128, containing the first sign of possible problems:

Ruby Murphy from NA [presumably, Native Allotment] section said she had called Mr. Roehl and he told her that the bay was drying up and that he wanted both his and his wife's NA's moved about 600 feet westerly.

There is another NA contiguous with the westerly boundary of Mr. Roehl's applied for location and any westerly movement in the location of his allotment would create a conflict.

Ruby Murphy said to survey Mr. Roehl's allotment as shown on the request for survey and in the Special Instructions.

The first evidence that Roehl would pursue a conflict with Nielsen appears in Roehl's file in the form of a handwritten memorandum dated July 26, 1985, signed by "N. Larsen," which states:

Rose Brady (BIA-Anch) called back to inform me that Shirley Nielsen \* \* \* is not in favor of moving her allotment to resolve a conflict that may be created if the Roehl amendment turns out to be valid.

Shirley was there (on the ground) first and is adamant that Daniel Roehl's claim belongs to the east of hers, and always has.

A note dated August 22, 1985, from Nancy Larsen, BIA, to BLM, attaches a copy of a letter from attorney James Vollintine, acting on behalf of Roehl, stating an intention to amend Roehl's allotment application A-052690 again. The note states that Vollintine was fully aware of the conflict created with Nielsen's allotment. Vollintine's letter, allegedly attached, does not appear in the record.

On October 4, 1985, BLM issued a formal notice of a proposed amended land description for Roehl's 140-acre tract. The notice stated that Roehl requested that the parcel be moved from its "present location" to "a location further to the west where it may be on the waterfront of Sid Larson Bay year-round, and

remaining in the same sections described above." BLM notified twelve parties, including Shirley Nielsen and the Bristol Bay Native Corporation (BBNC), 8/ of this proposed amendment under section 905(c) of ANILCA. BLM advised these parties that they had 60 days within which to protest.

On October 4, 1985, Shirley Nielsen filed a timely protest against displacing her allotment.

I hereby protest amending Daniel Roehl's native allotment A-052690, Parcel B in Sid Larson Bay. As I told you earlier by telephone, I am going to stand firm on my native allotment AA-6211, Parcel B. Any moving of Mr. Roehl's allotment and displacing my allotment at this late date will not be fair in any respect. I feel I have used, improved on allotment, and filed all proper paperwork in a timely matter. I will not move!! Not only would this action displace my allotment but others as well: this is just not fair!

I understand all allotments in question were ready for survey this fall but did not happen, why? I feel if this issue was so important to Mr. Roehl, he should have tried to do something about it a long time ago! This is my formal protest.

(Shirley Nielsen letter dated Oct. 24, 1985.)

BBNC filed two protests, one dated October 11, on behalf of Nielsen and Zackar, and another on October 16, stating:

It has never been BBNC's policy to permit the relocation of Indian Allotment boundaries upon ANCSA land to accommodate access because of changes in lake front access.

Any allotment boundary adjustment which conflicts with another allottee where entry predates the proposed relocation is unconscionable.

(Letter of BBNC dated Oct. 16, 1985.) 9/ BLM also received a protest from Betty J. Thompson, a niece of Donald F. Nielsen. See Betty J. (Thompson) Bonin, 151 IBLA 16, 31 n.12 (1999). The State of Alaska also filed a protest of Roehl's application, based on the location of a trail.

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8/ On August 1, 1980, pursuant to sections 14(f) and 22(j) of ANCSA, BLM had conveyed to BBNC lands surrounding Parcel B in secs. 3 and 10, T. 9 S., R. 31 W., by Interim Conveyance Nos. 357 and 358.

9/ This letter was signed by Donald F. Nielsen, as Senior Vice President of BBNC. Donald F. Nielsen is Shirley Nielsen's brother-in-law.

BLM issued a decision rejecting Roehl's proposed amendment on December 6, 1985. The decision stated:

On December 7, 1979, the Native allotment was approved and a survey was requested. The final plan of survey and special instructions were adopted May 10, 1982 (U.S. Survey No. 7128.) The metes and bounds description in the instructions is virtually the same as the field examiner's metes and bounds description (which was used to request the survey). \*  
\* \*

A memo to the survey instructions file dated August 11, 1983, by the Chief of Survey Planning and Records Section, stated that an adjudicator from the National Allotments Section had talked to Mr. Roehl by phone concerning his request to move his allotment 600 feet westerly because "the bay was drying up." \* \* \*

On June 11, 1985, the Chief of the Native Allotment Section received a letter from James Vollintine, private counsel to Daniel Roehl, requesting that the allotment be moved toward the west in order to locate it on the shore of Sid Larson Bay. (No new metes and bounds description was provided as the intended location, and the request for amendment was not approved by the [BIA]). Mr. Vollintine stated that the applicant had intended for his claim to be on Sid Larson Bay originally, but it was presently on a slough at the end of the bay which only had water in it part of the year. Therefore, he argued, [BLM] should move the allotment toward the west where Mr. Roehl could be on the shore of the bay having water year-round.

\* \* \* \* \*

Section 905(c) of [ANILCA] states: \* \* \* "... no allotment may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application . . . ."

Mr. Vollintine contends that the present description does not border Sid Larson Bay, and since that was the intent of the applicant when he staked his claim, the allotment should be resituated on the bay once again. We contend that the final plan of survey describes the land which was originally intended to be claimed by the applicant in 1968. Mr. [Roehl's] presence at the field exam in 1978 is further support that the description is correct. In view of the above, the request for Native allotment location amendment is denied.

(1985 BLM Decision at 2-3.) BLM also dismissed the protest filed by the State of Alaska. BLM did not serve any of the remaining protesting parties with a copy of the decision.

During the pendency of an appeal of this decision to the Board, discussed below, Nielsen's allotment was surveyed in August 1988, as part of U.S. Survey No. 8501. That survey was officially filed on December 10, 1988, and confirmed Nielsen's allotment as located on Sid Larson Bay, contiguous with Simeon Zackar to the west and Daniel Roehl to the east. The survey was "noted to records" on January 24, 1989.

On July 3, 1989, BLM issued a decision addressing only parcels A, C, and D of Nielsen's native allotment application AA-6211. BLM repudiated its July 16, 1982, decision with respect to those parcels, which had concluded that AA-6211 was legislatively approved under section 905(a)(1) of the ANILCA. The 1989 decision invalidated the 1982 decision because the subject lands had been included within MUC AA-818, which had segregated the lands from 1967 through November 12, 1981. (1989 BLM decision at 2.) BLM concluded that because the land was not "unreserved on December 13, 1968," as required by section 905(a) of ANILCA, the parcels could not have been legislatively approved. BLM proceeded to approve Nielsen's title to Parcels A, C, and D, pursuant to adjudication under ANCSA. 10/

B. Adjudications Before the Board of Land Appeals and the Hearings Division Involving Roehl's Proposed Amendment

Roehl timely appealed the 1985 BLM decision rejecting his amendment of Tract II to the Board. Roehl's theory was that BLM had been wrong in refusing to permit him to amend the application on grounds that the "plan of survey" had been filed prior to the amendment. He questioned even the meaning of that term as it appears in section 905(c) of ANILCA. Roehl argued that he had intended to apply for land staked "between 600 and 1,000 feet

10/ BLM's 1989 decision technically left parcel B in limbo. However, the 1982 decision legislatively approving Parcel B suffered the same defects as it did with respect to the remaining parcels in that Parcel B was also located within MUC AA-818. See 32 FR 3838-39 (Mar. 8, 1967); see also Betty J. (Thompson) Bonin, 151 IBLA at 18, 25-27. BLM apparently decided to exclude parcel B from the 1989 decision on June 6, 1989, when the BLM contacted the State of Alaska Department of Natural Resources to determine if any trails or rights-of-way crossed any of the 4 parcels. (Public Inquiry, June 6, 1989). The State employee advised BLM of Roehl's dispute. The memorandum cites the employee as stating that "there is a conflict with Par. B in that [Roehl] wants to move his allotment over as the slough has dried up."

west" of where it was located by BLM. (Roehl Affidavit at 3 ¶ 5.) Roehl stated that he began to use the property in 1960, but that only after 1968 did he go there "just about every year." Id. at 2 ¶ 3. His attorney alleged that he began using the land "for subsistence purposes in 1967." (Statement of Reasons, IBLA No. 86-278, at 4.) Roehl alleged that he had "long planned to use the allotment as the base for a resort for sports fishermen" and "the only way I can get meaningful access to the lake from the land, however, is to have access to the beach." (Roehl Affidavit at 3 ¶ 7.)

BLM rejected such reasoning as a basis for amending an application after the passage of ANCSA. BLM noted that ANCSA's repeal of the Act of May 17, 1906, precluded amendment of applications for new land not timely applied for. BLM noted that section 905(c) of ANILCA only permitted amendment "if the description as amended describes the land originally intended to be claimed." 43 U.S.C. § 1634(c). BLM cited the legislative history of ANILCA and Board precedent on this point. In Joash Tukle, 86 IBLA 26 (1985), aff'd, Civ. No. A85-375 (D. Alaska, April 7, 1987), the Board cited the legislative history limiting the circumstances in which amendments could be permitted after the passage of ANCSA:

In accordance with the Department's existing procedures for the amendment of applications, subsection (c) requires that the amended application describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land. [Emphasis added.]

S. Rep. No. 413, 96th Cong., 1st Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5230. Thus, it is clear that this provision was intended to enable Native allotment applicants to correct the legal description of the land for which they originally applied. See, e.g., Pedro Bay Corp., 78 IBLA 196 (1984). It does not authorize the substitution of a different parcel of land.

(BLM Answer, IBLA No. 86-278 at 45, quoting 86 IBLA at 27.)

The Board issued its decision in Daniel Roehl, 103 IBLA 96, on July 12, 1988. The Board held that the record contained no evidence that Roehl had received notice of the final plan of survey for Tract II, and that, in the absence of such notice, he could not be precluded from seeking to amend his application even though the final plan of survey had been completed. 103 IBLA at 100, citing Peter Paul Groth, 99 IBLA 104, 109-110 (1987) (untimely protest pursuant to 43 CFR 4.450-2 permitted where BLM failed to provide interested parties an opportunity to file

objections to the official filing of a plat of resurvey). As Roehl had submitted affidavits presenting disputed facts concerning whether his application correctly described the lands for which he originally intended to apply, the Board held that Roehl was entitled to a fact-finding hearing. 11/

Administrative Law Judge Ramon M. Child conducted a hearing on August 7, 1989. Nielsen found out about the hearing from friends and was in attendance, but was not given an opportunity to testify. 12/ (Nielsen's Supplemental Statement of Reasons, IBLA 2000-265, Exhibit 2 (Affidavit of Shirley Nielsen) at 2.)

At the hearing, Roehl's counsel raised the possibility of invoking section 905(b) to mediate and resolve the dispute between Nielsen and Roehl. In oral comments, he stated:

[T]he amendment sought by Mr. Roehl, if granted, will encroach on a neighboring allotment, an allotment claim asserted by a woman named Shirley Nielsen. It is not our intention to oust Ms. Nielsen from her claim. However, if Mr. Roehl's application is amended, there will, then, be conflicting applications for the same land, a situation which is expressly addressed in Section 905 (b) of ANILCA. That's 43 USC Section 1634 (b). Under this section when there is a conflict, the Department is to step in and help the parties resolve the conflict and mediate a resolution.

(Transcript, August 7, 1989, Roehl v. BLM, (Tr.) at 32-33.)

Judge Child clarified his belief that his role was limited to determining Roehl's original intentions, and not resolving any conflict between Nielsen and Roehl. The following colloquy took place between the Judge and Roehl's attorney.

THE COURT: And both Shirley Nielsen and Mr. Roehl have made applications clear to understand Mr. Roehl's original intent to be for the same piece of ground.

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11/ The Board was not apparently presented with the case file regarding Nielsen's claim, nor did its decision pertain to that protest. The Board's decision referring Roehl's appeal to the Hearings Division was not served on any protesting parties other than the State of Alaska.

12/ Judge Child was aware of the protests, noting that "Bristol Bay Native Corporation protested the proposed amendment because it would conflict with the Native allotments of Shirley Nielsen and Simeon Zackar. Betty J. Thompson, Shirley Nielsen, and the State of Alaska also filed protests." (Judge Child's Mar. 16, 1990, Decision at 3.)

MR. BROWN [Roehl's attorney]: That is precisely correct, Your Honor, and there is a statutory mechanism for resolving that conflict.

THE COURT: And that Shirley Nielsen's application has not been resolved?

MR. BROWN: That's correct.

THE COURT: Is it because of the pendency of this action?

MR. BROWN: That is my understanding.

THE COURT: So it's awaiting the determination of this action before they decide the priorities of those two allotment applications.

\* \* \* \* \*

THE COURT: But we are not here to determine the relative interest of Shirley Nielsen vis-a-vis Mr. Roehl. But we are here to find out what Mr. Roehl's original intent was with the filing of the amended application dated February 27, 1968.

(Tr. at 112-13.)

The theory behind Roehl's presentation was that BIA had, after listening to his description of the land he wished to apply for, erroneously allocated that land based on errors in originally locating Nellie Roehl's claim. Roehl contended that the metes and bounds description recorded by BIA and verified by BLM on the ground during field investigations and surveys was never the land for which he intended to apply. (Tr. at 58-62.) He testified that he had stepped off his and his wife's allotments at the same time. Roehl claimed that he had described to BIA both his and his wife's western corners as located on opposite shores of a deep water bay, but the BIA description designated lands east of the deep water. As his description was tied to hers, Roehl contended that both allotments were marked off incorrectly. Roehl testified that they were attempting to amend Nellie Roehl's allotment as well. (Tr. at 67-68, 115-116.) 13/

Roehl testified that the field report from the 1978 field examination conducted by BLM Realty Specialist Neufelder was mistaken. Neufelder presented lengthy testimony regarding this field examination, stating that Roehl's improvements were located

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13/ According to Roehl's attorney, Nellie Roehl submitted an application to amend in 1986. (Tr. at 67.)

within the boundaries of the claim as originally signed by Roehl and that Roehl had not objected to the identification of the site at the time. (Tr. at 181-202.) Roehl contended that Neufelder failed to verify Roehl's corners on the ground during the field examination, but instead relied on corners erroneously described by BIA and marked by BLM for the Nellie Roehl allotment. Roehl asserted that when BLM performed the surveys, the same mistake was made on both pieces of property. (Tr. at 60-65, 115-16, 120-22.) The legal impact of his desired amendment would be to fully incorporate Nielsen's Parcel B within Roehl's allotment boundaries. (Tr. at 118.)

Roehl testified that he staked the corners of Tract II in September 1967. (Tr. at 50.) Critical to Parcel B, Roehl testified that he traveled to the tract by boat with Gabriel Olympic. He stated that they brought the boat into a sandy beach just west of a narrow slough at the easternmost part of Sid Larson Bay, and drove in one stake on the shoreline. (Tr. at 51, 55, 57-58.) Olympic testified that he "drove in the stakes" for the westernmost boundary of Roehl's allotment on a sandy beach at the boundary of Simeon Zackar's allotment, "where the western boundary of [AA-]6211 meets the water." (Tr. at 134, 136-38.) 14/ Roehl's attorney asserted that Roehl placed the westernmost markers approximately 600-1000 feet further west than plotted by BLM. (Tr. at 30.) Roehl did not commit to a precise position. (Tr. at 40-62.) 15/

Roehl did not contend that he had an interest in all of Parcel B. Rather, Roehl testified that his interest in Parcel B derived from his desire to obtain year-round access to his allotment by boat and snowmobile for purposes of a resort on Nellie Roehl's allotment. (Tr. at 72-75, 85-89, 97-98, 124-31, 210.) Roehl testified that, at the time of the hearing, he and

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14/ To the extent Olympic meant to suggest that the western boundary of Nielsen's application AA-6211 was identified by markings in 1967, we note that Nielsen submitted her application in 1970.

15/ As the record stands now, there is no other evidence concerning the precise location of any markers, corners or stakes placed by Roehl or Olympic. The testimony indicates that Roehl identified the location of the beach marker on a map, Exhibit A-1. The transcript reports that Roehl introduced two exhibits, A-1 and A-2, and BLM introduced five, designated R-3 through R-7. (Tr. at 2.) With the exception of Exhibit R-7, which is a copy of the special survey instructions written for survey of Tract II, dated April 1, 1982, the exhibits are no longer in the official case record, and, presumably, have been lost. In his Post-Trial Brief, at 7 n.1, BLM's attorney noted: "It is unusual for a transcript not to include copies of the Exhibits. This one did not. One of the government's files has been misplaced and naturally it is the one with copies of the Exhibits."

his wife were operating a fishing resort from Ms. Roehl's allotment, where they resided. Id. at 74. The improvements associated with the fishing resort were on her allotment. (Tr. at 46, 74, 97-98.) Roehl never put improvements on Parcel B, id. at 117, and did not place permanent improvements on his own allotment until 1973. Id. at 128-29. A barge brought fuel for the resort as far as it could go, but it dropped the fuel off at Donald Nielsen's allotment, where Roehl picked it up and transported it to the resort. Id. at 75. Roehl stated that if his allotment application was not amended, "I would operate, but it would be harder for me to get fuel and stuff there. I would have to move my drums and everything, my storage tanks." Id.

According to Roehl, he could obtain year-round access to the resort only across Parcel B. Roehl's Tract II, as surveyed, contained a slough that "goes dry in the spring and there is water in the fall." (Tr. at 85, 92.) Roehl testified that he could negotiate the slough by boat in the fall, and when the slough was "dry" or "too shallow for a boat," he could cross Tract II by "lund" or "skiff." Id. at 125-27. In winter, the deep water freezes so that adjacent land can be accessed by snowmobile, but the shallow water in the slough does not freeze, and, if he was using a snowmobile, Roehl could only access the main portion of Tract II by walking across Donald Nielsen's allotment. (Tr. at 75.) "What I want is access to the land from this water that's deep enough for me to get to it." (Tr. at 86.)

Roehl stated that he "would accept the surveys," if he could have "access to [his] land." (Tr. at 87.) He claimed that both Shirley and Donald Nielsen had either refused to discuss access or threatened to deny him access to his allotment over theirs. (Tr. at 72-74.)

On March 16, 1999, Judge Child issued his decision concluding that Roehl should be permitted to amend his claim, because Roehl likely intended to have included Parcel B within his 1968 amended application. (Roehl v. BLM, No. 86-278, Decision at 5-7.) Judge Child identified the requirements for amendment in 43 U.S.C. § 1634(c) (1988), id. at 3, and quoted the Board's decision in Angeline Galbraith, 97 IBLA 132, 147, 94 I.D. 151, 159 (1987):

[T]he question of intent must be determined based on the facts and circumstances reflected in the record. Relevant to the question of intent are the geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any landmarks or improvements, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. \* \* \* Moreover, an applicant should show how his or her

activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

(Judge Child's Decision at 4.)

Finding that "[i]t is more likely than not that the northwest corner of Mr. Roehl's Parcel B was staked at the point designated #4 on Exhibit A-1 and that the parcel outlined in pink thereon correctly describes the land for which he originally intended to apply," Judge Child held that "Roehl should be permitted to amend the legal description of his Native allotment claim (Tract II) to encompass the land he originally staked and intended to claim, to-wit: the land within the pink border on Exhibit A-1." Id. at 6-7. <sup>16/</sup> He ordered that "[t]he description of the land claimed in the application filed by Daniel Roehl for Parcel B (Tract II) shall be amended to conform to the pink borders set forth in Exhibit A-1." Id. at 7.

#### C. Conflict Resolution Proceedings

On August 20, 1990, BLM issued a notice to Roehl stating that Judge Child had "ordered \* \* \* [BLM] to amend the land description for Parcel B to encompass the land you originally staked and intended to claim." The notice further stated: "Before survey can be requested, adjudication must be completed on your amended parcel. The surrounding land status as well as your use and occupancy date and improvements will be taken into consideration." (1990 BLM Notice to Roehl dated Aug. 21, 1990.)

On October 10, 1990, BLM issued a notice to both Roehl and Nielsen, officially informing Nielsen that the two parcels were in conflict. Citing section 905(b) of ANILCA, BLM noted that, "[i]n order to resolve this conflict, you may need to ask the Bristol Bay Native Association (BBNA) for assistance." Finally, the letter stated:

In order for us to continue processing your applications, you must agree with each other on the boundaries of each allotment and let us know what the boundaries are within 60 days of your receipt of this notice. If an agreement cannot be reached with the conflict being resolved, the boundaries will be adjusted by BBNA or BLM before the on-the-ground survey is done.

(BLM Notice to Roehl and Nielsen, Oct. 10, 1990.)

<sup>16/</sup> It is unclear whether Judge Child actually had this lost exhibit before him when he issued his decision.

On November 8, 1990, BLM received a letter from Gusty R. Chythlook, Sr., Realty Specialist for BBNA, stating: "Enclosed is a conflict resolution packet for the above named allottees. The attached map depicts how they want the survey instructions to reflect. Please adjudicate accordingly."

The "Native Allotment Conflict Resolution Form," signed by Daniel Roehl and Shirley Nielsen on November 2, 1990, contains the following form language:

Pursuant to Section 905(b) of \* \* \* [ANILCA], we, the undersigned allotment applicants[,] propose the following boundary adjustment, which is consistent with our prior use and conforms to our original intent, in an attempt to resolve the conflict which exists between our Native Allotment lands. \* \* \* We propose the conflict between our Native Allotment lands be resolved by adjusting our respective boundaries so that they conform to the description as set forth on the map(s) attached to this form.

The attached map depicts the Roehl allotment as encompassing all of Nielsen's original Parcel B, and moves her allotment to the south of Roehl's, distant from the water.

On June 25, 1991, BLM Realty Specialist Richard S. Stephenson undertook a field examination of the revised location of Parcel B. Stephenson indicated that Nielsen was not present but had indicated "in writing" that Roehl was authorized to represent her. 17/ According to Stephenson's report,

Daniel Roehl was present during the overflight. Mr. Roehl's primary interest was to insure that he had access to Sid Larson Bay. Mr. Roehl's interests apparently are not the same as the applicant's. I consider that during the June 25, 1991, overflight the applicant, Shirley M. Nielsen, was not adequately represented and therefore a more complete field examination of the revised parcel was not performed.

\* \* \* \* \*

No improvements or man made features were observed in the vicinity of the revised location other than the U.S. Surveys. Nothing was observed which might change the findings of the original 1975 field exam. \* \* \* The

17/ The letter to which Stephenson refers is a form letter dated May 24, 1991, informing Nielsen of the field examination. The letter, which contains no signature and has no attached envelope or certified mail receipt, authorizes Daniel Roehl to accompany the investigator on her behalf.

BIA conflict resolution dated November 2, 1990, does not appear to adequately serve the applicant's original intentions.

\* \* \* \* \*

I did not find any physical evidence of use on the revised parcel to support the applicant's claim.

(Stephenson Land Report, Nov. 15, 1991, at 3, 5.)

Despite this finding, on April 22, 1992, BLM issued a decision adjudicating Nielsen's Native Allotment Application, Parcel B, as "amended/corrected" by virtue of the November 8, 1990, conflict resolution form. (1992 BLM Decision at 2.) The decision substituted the following description for Nielsen's original Parcel B: "Approximately 40 acres of land located within Sec. 10, T. 9 S., R. 31 W., Seward Meridian, as shown on the enclosed maps." Id. The decision adjudicated Nielsen's use and occupancy based on the parcel for which she originally applied, i.e., the lands described in the 1975 Stowers field report, as if they were the lands in sec. 10 substituted by the decision. The decision stated:

On June 24, 1975, John Nielsen, the applicant's husband accompanied a BLM field examiner to Shirley Nielsen's allotment. There he identified the claimed lands which had been described correctly on the application. The improvements specified in the application were found on the parcel. Based on the improvements and the familiarity with the land, the BLM field examiner concluded that the applicant used the parcel in its entirety.

(Apr. 22, 1992, Decision at 3.) Notwithstanding the foregoing, the fact of the matter is that the parcel BLM awarded to Nielsen in this decision was not the Parcel B which the field report discussed and which contained her improvements.

On March 26, 1998, BLM issued a report stating that the plat of survey was officially filed for Parcel B, AA-6211. The "dependent resurvey," U.S. Survey 12089, was allegedly based on U.S. Surveys 7128 and 8501, which were the two surveys conducted for Roehl's Tract II in 1982, as originally submitted, and Nielsen's Parcel B in 1988, as submitted. The resurvey indicated that Nielsen's Parcel B, AA-6211, is located exclusively within sec. 10.

On May 14, 1998, BLM issued a notice to Nielsen entitled "Conformance to Plat of Survey," indicating that the official

plat of survey for her allotment had been filed, and that her allotment would be described as

Lot 2, U.S. Survey No. 12089, Alaska.

Containing 40.00 acres, as shown on the plat of survey officially filed on March 26, 1998, located within Sec. 10, T. 9 S., R. 31 W., Seward Meridian, Alaska.

(BLM Notice to Nielsen, May 14, 1998.)

At that point, Nielsen first obtained legal representation. On June 10, 1998, her attorney sent a letter to BLM objecting to the plat of survey on the grounds that it bore no relation to her original application. Her attorney requested that BLM set aside the 1992 BLM decision amending AA-6211 based on the conflict resolution, alleging that it had been reached as a result of duress, lack of adequate representation and intimidation. Subsequently, attempts were made to renegotiate the conflict. Those attempts, which involved a proposal for an exchange of lakefront property on Sid Larson Bay owned by the Alaska Peninsula Corporation to be conveyed to Shirley Nielsen in exchange for the allotment she received in the conflict resolution, failed. 18/

On November 24, 1998, Nielsen's attorney informed BLM that Nielsen had not rescinded her request to set aside the conflict resolution, and that he would be filing a notice of appeal "with respect to the notice concerning conformance to plat of survey dated May 14, 1998." However, on November 30, Nielsen's attorney filed an appeal of the 1992 BLM decision adjudicating Nielsen's allotment as "amended/corrected." BLM did not forward the appeal to the Board, finding that it was untimely. (BLM Letter Decision dated Dec. 23, 1998, denying Nielsen's November 30, 1998, appeal.) However, BLM informed Nielsen that it would "in the near future be issuing a decision regarding the survey of your allotment claim," and that, "[i]f you do not agree with the survey of your claim, you may appeal the decision at that time." Id.

On April 17, 2000, the BBNA submitted a letter to BLM asking for a certificate of allotment to be issued to Roehl for his Parcel B, which was described in an attached map as amended to include the former Parcel B to AA-6211. The BBNA also submitted an attached agreement, signed by Roehl, to provide Nielsen access to "her Native Allotment AA-6211 parcel B, located in T. 9S., R.31W., SM, Sections 3 and 10." (April 13, 2000, letter from

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18/ All of this was accomplished with a series of extensions of time "to respond to the survey notice." It is not clear why BLM did not perceive the attorney's letter as a notice of appeal of the 1998 "Conformance to Plat of Survey."

BBNA to BLM (emphasis added).) This map attached to the agreement and letter provided Nielsen a 15-foot trail to her parcel depicted only within section 10.

On May 2, 2000, BLM issued the decision entitled "Native Allotment Conformed to Survey" (2000 BLM Decision). It conformed Nielsen's allotment to the official BLM plat of survey filed on March 26, 1998, describing Nielsen's parcel as "Lot 2, U.S. Survey No. 12089, Alaska, located within Sec. 10, T. 9 S., R. 31 W., containing 40.00 acres." Noting that "[o]n April 22, 1992, \* \* \* Nielsen's application for Parcel B was approved pursuant to the requirements of the Act of 1906 based on information of use and occupancy contained in the original field examination of the claim," and that Nielsen had agreed to the lands surveyed in the conflict resolution, BLM's decision granted Nielsen the parcel described in the May 14, 1998, decision. (2000 BLM Decision at 2, 3.) This decision was served on Nielsen and Roehl.

Nielsen timely appealed and filed a statement of reasons (SOR) and a petition for stay. She failed, however, to serve Roehl. On July 21, 2000, we granted the petition for stay, ordered service on Roehl, and provided 30 days within which Roehl and BLM could submit answers in this matter. On August 11, 2000, the Board received a copy of a letter from Daniel Roehl, in which he protested "amending Shirley M. Nielsen Native allotment AA-6211," in language largely duplicating that contained in Nielsen's original protest filed in 1985. Nielsen answered Roehl's letter on September 5, 2000. We consider the "protest" to be Roehl's timely answer. BLM never answered. Nielsen filed a Supplemental Statement of Reasons (SSOR) on August 1, 2000.

#### Arguments Presented on Appeal

Nielsen presents three central issues. (SSOR at 2, 10-21.) First, she asserts that the protest she filed against Roehl's attempt to amend his application in 1985 was ignored in violation of section 905(c) of ANILCA, 43 U.S.C. § 1634 (1994). *Id.* at 2, 10. As we understand her assertions, Nielsen claims that Judge Child and BLM violated her due process rights by failing to provide her a place at the table in the determination of whether Roehl's application could be amended, even though the proper filing of her protest required her inclusion.

In support of this argument, Nielsen points to the failure of the Department to provide her notice of decisions with respect to Roehl's amendment or an opportunity to be heard in the context of her protest. She asserts that Judge Child violated her due process rights by adjudicating Roehl's right to amend his application without adjudicating her protest against his amendment. (SOR at 1.) Nielsen contends that BLM's decision to award Daniel Roehl Parcel B without adjudicating his entitlement to the parcel is contrary to the provisions of the

Allotment Act of 1906, which require that a Native establish use and occupancy "potentially exclusive of all others," unless the claim is legislatively approved pursuant to ANILCA, 43 U.S.C. § 1634 (1994). (SSOR at 12, 15.) Citing Becharof Corp., 147 IBLA 117, 129 (1998), she claims that "submission of a protest made her a party to the Roehl matter within the meaning of 43 C.F.R. § 4.410(a) \* \* \* ." (SSOR at 13.) She asserts that BLM violated 43 CFR 4.450-2 by failing to honor her timely protest to Roehl's allotment amendment, and that "[t]he failure to provide Ms. Nielsen with notice and an opportunity to be heard with respect to Mr. Roehl's proposed amendment, and her timely protest, renders any subsequent agency action adjudicating her rights vis-a-vis Mr. Roehl's application invalid." Id. at 12. She asserts that the set of agency decisions violated her due process right to be heard, as set forth in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), by effectuating the rejection of her allotment claim without notifying her of the specific reasons for the proposed rejection and without allowing her to submit written or oral evidence to the contrary. (SSOR at 11.)

Second, Nielsen contends that BLM committed reversible error by assuming that Judge Child's decision adjudicated Roehl's entitlement to Parcel B, when the scope of the hearing was limited to "what Roehl's original intent was, at the time he filed the 'Amended Application dated February 27, 1968'." (SSOR at 14.) 19/ Nielsen argues that the only appropriate course for BLM, after Judge Child's decision, was to adjudicate her protest. Id.

Finally, Nielsen maintains that the conflict resolution resulting in the relocation of AA-6211 to a southern and landlocked tract is not legally enforceable. (SSOR at 18.) In support of this claim, she asserts that, in accepting the conflict resolution agreement, BLM violated section 905(b) of ANILCA by adjusting her application boundaries in a manner inconsistent with her prior use. Id. at 18-19, citing Anna S. Moxie, 127 IBLA 175, 179-80 (1993). Nielsen further asserts that the conflict resolution should be set aside because it was obtained as a result of fraud, undue influence, misrepresentation, and duress. (SOR at 1, SSOR at 11, 20-22.)

By way of relief, Nielsen requests that the Board convey to her the original Parcel B, AA-6211, which was undisputedly the parcel abutting the southeast end of Sid Larson Bay. (SSOR at 22.) She claims:

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19/ Nielsen also points out that on May 13, 1969, Roehl had rescinded that application, contending that Judge Child's reference to that amendment shows that he was confused as to the facts of the application being amended.

This Board is not bound by erroneous decisions in violation of law. This Board must take an independent look at what has occurred. Ms. Nielsen is entitled to have her protest fairly adjudicated, her Conflict Resolution agreement rescinded, and to obtain title to the Parcel B which conforms to her original intent.

Id. at 11.

### Analysis

The record reveals that at many junctures this Department failed Shirley Nielsen, and, by necessary implication, Daniel Roehl. For the reasons stated below, we reverse the decision appealed from and remand the matter to BLM to adjudicate Nielsen's protest, and any other protests, against Roehl's effort to amend his Native allotment application to incorporate Parcel B under ANILCA section 905(c), 43 U.S.C. § 1634(c) (1994).

[1] This Board has long held that Native allotment applicants have property interests in their Native claims which entitle them to notice and an opportunity to be heard before their applications can be denied. State of Alaska, 40 IBLA 79, 84 (1979). The minimum process attendant on denial of such claims was established in 1976 in Pence v. Kleppe:

[A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143; Erling Skaflestad, 155 IBLA 141, 149 (2001); Heirs of George Brown, 143 IBLA 221, 226-27 (1998).

In 1970, Nielsen applied for Parcel B, Native Allotment application AA-6211, for use and occupancy that allegedly began in 1956. BLM's 2000 decision entitled "Native Allotment Conformed to Survey" effectively rejected her application without a decision with respect to her actual application or a hearing to determine the facts surrounding it. The procedures undertaken by this Department to get to that 2000 decision effectively side-stepped the adjudication procedures which would have permitted Nielsen the process that was due. In the absence of a hearing or adjudication, BLM rendered no conclusion with respect to Nielsen's assertions of use and occupancy, other than to recast the findings in the 1975 field examination conducted by Ken Stowers, favorable to Nielsen's claim to Parcel B, as if they

covered the substituted plot in sec. 10 offered to Nielsen 17 years later. (1992 BLM Decision amending AA-6211.) <sup>20/</sup> Despite actual findings in Nielsen's favor with respect to her use and occupancy of the Parcel B described in her original application, it has been removed from her and another parcel substituted without basis in fact, but rather based on assertions on a conflict resolution form.

Nielsen is entitled to due process procedures before she may be deprived of her property interest in her Native allotment application for Parcel B in AA-6211. She has been denied both due process and Parcel B. Accordingly, we reverse the 2000 BLM decision entitled "Native Allotment Conformed to Survey."

Unfortunately, this does not end the matter. Various Departmental decisions and actions, including those resulting from the alleged conflict resolution, justify BLM's moving forward to conform Nielsen's allotment to U.S. Survey 12089, even in the absence of the challenged 2000 decision. Our reversal of BLM's 2000 decision would not, standing alone, be effective in providing Nielsen the process due her. Accordingly, examination of various actions of the Department since the Board rendered its decision in 1988 is critical to determining what decisions must be reversed or dispensed with, and what should happen going forward.

[2] Before undertaking that analysis, we must determine whether finality bars us from doing so. Reopening questions potentially resolved some years ago raises questions, at least for Roehl, regarding whether the doctrine of administrative finality should bar us from revisiting conclusions reached in previous adjudications and proceedings.

The doctrine of administrative finality is the administrative counterpart of the doctrine of res judicata. Erling Skaflestad, 155 IBLA at 148. The doctrine establishes that "when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice." Id. at 148-49; see generally William Demoski, 143 IBLA 90, 95-122 (1998), Burski, A.J., concurring. Application of the principle of administrative finality involves jurisprudential rather than

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<sup>20/</sup> BLM took this action notwithstanding the field report for the June 25, 1991, field examination on which the 2000 BLM decision is based, in which BLM Realty Specialist Stephenson stated: "Nothing was observed which might change the findings of the original 1975 field exam." (Stephenson Land Report, Nov. 15, 1991.)

jurisdictional considerations, and it cannot be invoked where to do so would result in a manifest injustice. Betty J. (Thompson) Bonin, 151 IBLA at 28; see also Eva Wilson Davis, 136 IBLA 258, 262-63 (1996).

We find that invoking this doctrine concerning prior Departmental adjudications in this matter would indeed work a manifest injustice against Shirley Nielsen. As noted above, the challenged 2000 BLM decision did not protect Nielsen's rights to due process in dispensing with her application for Parcel B. Likewise, to the extent this 2000 decision is premised on decisions rendered by the Department, those decisions ignored legal rights afforded Nielsen in section 905 of ANILCA, 43 U.S.C. § 1634 (1994), and the due process protections ensured in Pence v. Kleppe, 529 F.2d at 142, and its progeny.

[3] ANILCA reasonably set forth a process which, had it been followed, would have ensured that Nielsen had an adjudicatory proceeding in which to present her case for why Roehl should not be allowed to amend his application, presumably based on her use and occupancy of Parcel B. Section 905(c) ensured that, once it was determined that Roehl intended to apply for land other than what his original application described on its face, the amended application would be subject to protest and adjudication. Only after adjudication of any outstanding protest could the land descriptions in the two applications stand in direct conflict with each other, permitting BLM to consider conflict resolution procedures in section 905(b). That process was improperly invoked prior to an adjudication of Nielsen's protest. 21/

The proper procedure for determining whether Roehl's application could be amended was set forth in ANILCA section 905(c), which provides:

An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. \* \* \* *Provided*, That the Secretary shall notify \* \* \* all interested parties \* \* \* of the intended correction of the allotment's location, and any such party shall have [a specified amount of time] to file with the Department of the

21/ Likewise, the protests of BBNC, Simeon Zackar, and Betty Thompson remain unaddressed. We address below only Nielsen's protest, but the same principles apply to any other outstanding protests.

Interior a protest as provided in subsection (a)(5) \* \* \*:  
Provided further, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment.

43 U.S.C. § 1634(c) (1994) (emphasis supplied). Subsection 905(a)(5), in turn, provides that no legislative approval may occur if a protest is filed; such a protest must be adjudicated pursuant to the Native Allotment Act of 1906:

[The] Native allotment application shall be adjudicated pursuant to the requirements of the act of May 17, 1906, as amended, if, \* \* \* (C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

43 U.S.C. § 1634(a)(5)(C) (1994). 22/

On October 4, 1985, BLM rejected Roehl's proposed amendment. BLM found that Roehl had no original intention of incorporating the land within Nielsen's Parcel B, and under the last proviso of section 905(c), BLM found that no amendment was permitted because it had adopted a final plat of survey. BLM properly refused to address any aspect of Nielsen's protest. Rather, BLM stated:

We will not address the potential conflicts here because such a discussion would necessarily have to follow a determination that Mr. Roehl's allotment required an amended location. We do not believe this to be the case.

(December 6, 1985, BLM Decision at 3.) 23/ This decision resolved the outstanding protests only derivatively, making them unnecessary by virtue of the conclusion that Roehl did not originally intend to claim Parcel B.

When this Board reversed that 1985 BLM decision in 1988, it reversed BLM only on the points BLM had decided. Daniel Roehl, 103 IBLA at 96. This Board's decision likewise did not pertain to the protests, other than, derivatively, to open the question of whether they might be revived in the future if the Hearings

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22/ In 1992, Congress enacted amendments to section 905 of ANILCA which caused the provisions of subsection 905(a)(5) to cease to apply in circumstances not relevant here.

23/ That decision was entitled "Native Allotment Location Amendment Rejected, Protest Dismissed." The dismissal pertained only to the protest filed by the State of Alaska. Id.

Division were to find that there was an "intended correction" under the terms of section 905(c). When the Board ordered a hearing regarding Roehl's appeal, it directed the Administrative Law Judge to conduct fact-finding only into the question of intent.

Judge Child determined that it is "more likely than not" that Roehl intended to apply for Parcel B. (Roehl v. BLM, No. 86-278, Decision at 6.) Judge Child correctly understood that the issue of an adjudication was to be left to subsequent proceedings before BLM, depending on the outcome of the hearing he was holding. He refused to adjudicate Nielsen's interest, asserting that he was considering only the question of Roehl's original intent with respect to his 1968 amendment of A-052690. (Tr., Roehl v. BLM, at 32-33.) Having found Roehl's original intention to have been consistent with his proposed amendment, Judge Child proceeded to conclude that "Mr. Roehl should be permitted to amend the legal description of \* \* \* [Tract II] to incorporate" Parcel B. (Judge Child's Decision at 7.)

The amendment allowed by Judge Child should have propelled the case through the procedures of section 905(c). Under that provision, BLM would have notified interested parties "of the intended correction of the allotment's location," and those parties would have been permitted to file, or in this case restate, "a protest as provided in subsection (a)(5)." Thus, section 905(c) would have and should have provided Nielsen an adjudication, under the Act of May 17, 1906, of Roehl's use and occupancy in light of the fact that Parcel B "is the situs of improvements claimed by" Nielsen in her Native allotment application, AA-6211. 43 U.S.C. § 1634(a)(5)(C) (1994).

BLM failed to follow these procedures. BLM proceeded as if permitting Roehl to amend his original Native allotment application also resolved any outstanding protest or, conversely, prohibited a subsequent protest to the amendment. Ignoring section 905(c), BLM imposed the conflict resolution procedures of section 905(b) to resolve a dispute. BLM thus treated Roehl's application as a conflicting application for Parcel B, something it was not and could not be until adjudication of any protest.

Section 905(b) of ANILCA provides, in pertinent part: "Where a conflict between two or more allotment applications exists due to overlapping land descriptions, the Secretary shall adjust the descriptions to eliminate conflicts\* \* \*." 43 U.S.C. § 1634(b) (1994) (emphasis added).

This case could not present a conflict between two allotment applications with overlapping land descriptions until after adjudication of any outstanding protests as required by

sections 905(c) and (a)(5). In the absence of those procedures, BLM prematurely effectuated Roehl's desired amendment and placed it on an equal footing with Nielsen's application, prior to adjudication of Nielsen's protest under section 905(c), in violation of that statutory provision. 24/ Thus, to the extent that BLM ordered Nielsen to engage in conflict resolution under section 905(b), without resolving her protest under section 905(c), such an order must be reversed as a violation of those provisions of ANILCA. 25/

[4] BLM's failure to follow the legislative scheme fatally undermined all of its subsequent actions. Improperly engaging in conflict resolution under section 905(b), BLM's actions in that regard must be reversed. It is important to note as well that, should those procedures become relevant after adjudication of Nielsen's protest, BLM will not be permitted to rely on the conclusion in its 1992 decision that Nielsen's intention to apply for the substituted parcel is reflected in the 1975 field examination. This conclusion is demonstrably false on the record.

In resolving any conflicts in competing Native allotment applications, section 905(b) specifies that the Secretary

consistent with other existing rights, if any, may expand or alter the applied-for allotment boundaries or increase or decrease acreage in one or more of the allotment applications to achieve an adjustment which, to the extent practicable, is consistent with prior use of the allotted land and is beneficial to the affected parties: Provided, That the Secretary shall, to the extent feasible, implement an adjustment proposed by the affected parties \* \* \*.

43 U.S.C. § 1634(b) (1994) (emphasis added). If the parties are unable to agree, the Secretary must adjudicate the proper boundaries consistent with these terms. Anna S. Moxie, 127 IBLA at 179-80.

24/ We note, also, that the full extent of the "intended correction" was never entirely clear in Roehl's documents or testimony. See discussion above of 1985 BLM Decision at 1-2 (no metes and bounds description), and Transcript of Roehl's testimony regarding his desire for "access." Those corrections, if any, would properly have been resolved in the course of an adjudication under sections 905(c) and (a).

25/ This outcome is mandated also by the Supreme Court's decision Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, 333 (1945).

BLM sent Nielsen a certified "notice" entitled "Native Allotment Application Conflict Resolution Required." The notice informed her that she and Roehl "must agree with each other on the boundaries of each allotment and let us know what the boundaries are within 60 days." (Oct. 10, 1990, BLM Notice.)

Nothing in section 905(b) requires the mandatory "agreement" imposed by BLM on Nielsen in this October 10, 1990, notice requiring conflict resolution. Rather, in granting the Secretary broad discretion to resolve conflicts engendered by overlapping allotment descriptions, Congress stated that, to the extent feasible, agreements of the parties in resolving boundary disputes are to be honored. The Senate Report states: "[W]here the concerned allotment applicants present a proposal for adjustment, the Secretary is required to implement it to the extent that it is feasible." S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5229. Section 905(b) imposed no compulsion on Nielsen to agree with Roehl, especially when, based on the various legal rulings, it required her to abandon her claim.

Moreover, section 905(b) enunciates that BLM must exercise its discretion to eliminate boundary conflicts between allottees "consistent with prior use of the allotted land and in a manner beneficial to the affected parties." Congress stated that the Secretary's discretion is "to be guided by prior land-use patterns and the Secretary's ordinary fiduciary obligation to exercise his discretion in a manner beneficial to the allottees." *Id.* (emphasis supplied). BLM could not and did not, on this record, make findings here that this conflict resolution was guided by any party's prior use or that it was "beneficial" to Nielsen.

[5] Notwithstanding the foregoing, it is important to determine whether Nielsen's agreement to the 1990 conflict resolution, that led to the 1992 BLM decision amending Nielsen's application, should bar us from revisiting that issue on grounds that she knowingly and voluntarily relinquished Parcel B. It is entirely conceivable for a Native allotment applicant to waive rights to his or her claim, or to enter into an agreement to waive rights to the claim for valuable consideration. Nielsen did sign the agreement.

As a general rule, any relinquishment of a Native allotment application must be voluntary and made with knowledge of the consequences of the relinquishment. Katherine C. (Zimin) Atkins v. BLM, 116 IBLA 305, 312 (1990); Matilda Titus, 92 IBLA 340, 343 (1986). When the possibility exists that an allotment applicant involuntarily and unknowingly relinquished her allotment application in whole or in part, or was fraudulently induced to do so, facts alleged in a supporting affidavit are to be treated as true, and the allottee is entitled to a hearing to determine

whether her relinquishment was "knowing and voluntary." Estate of Willie Arkanakyak, 137 IBLA 58, 60-61 (1996). In Heir of Frank Hobson (On Reconsideration), 121 IBLA 66, 67-68 (1991), the Board identified the overlap between the requirement that an applicant relinquish a Native allotment application knowingly and voluntarily and the reasoning of Pence v. Kleppe, 529 F.2d at 135. The Board noted that the Ninth Circuit's reasoning regarding due process applied to relinquishment cases "so that when 'the possibility exists that an allotment applicant involuntarily and unknowingly relinquished her allotment application in whole or in part, or was fraudulently induced to do so, she is entitled to the procedural protections of Pence'." 121 IBLA at 68, quoting Feodoria (Kallander) Pennington, 97 IBLA 350, 355 (1987).

Nielsen's agreement to the conflict resolution was neither comprehending nor voluntary. BLM ordered Nielsen and Roehl to agree to a "conflict resolution," on October 10, 1990. As a result, Nielsen "relinquished" Parcel B on a standard form in return for a substituted tract that lies south of the original parcel and distant from Sid Larson Bay, next to which Parcel B had been located. Nielsen claims that during the process, she was misled by BBNA and other officials, who told her she would receive an "equivalent parcel." In an affidavit, Nielsen alleges that she was subjected to misrepresentation and duress during negotiations with BBNC and Roehl.

After the hearing, when BLM decided to allow Daniel Roehl to amend his allotment description, Dugan Nielsen from BBNA called me many times. He and Daniel Roehl's attorneys told me there was nothing more I could do and that I would have to compromise. They told me if I agreed to compromise with Daniel that I would be given an equivalent parcel of land. All these discussions were done by phone. I wanted to speak with Daniel in person but he would not talk with me.

I believed that "equivalent" meant that the land would be the same as the land I had applied for and had used since 1956. I agreed to a settlement that would give me this same land.

The Conflict Resolution form provided that I would receive my allotment, that is, the parcel that I had applied for, and which I had always used. I had no reason to believe that BIA and BLM would have me sign a form which they knew was untrue. The form said the parcel I was agreeing to receive was consistent with my prior use and original intent. The parcel BLM is

attempting, now, to convey to me is 100 percent inconsistent with my prior use and original intent, and BLM knows this.

(SSOR Exhibit 2, Nielsen Affidavit, ¶¶ 8-10 (emphasis added).)

Nielsen's claims that she was pressured into signing an agreement that she was led to believe would be fair to her are entirely consistent with the record. Her claim that she was told that there was "nothing else she could do" is clear from the October 10, 1990, BLM notice ordering conflict resolution. For reasons stated above, this notice was an erroneous statement and thereby her agreement was obtained by misrepresentation. She was not represented by counsel at that juncture.

But for her signature on that ordered agreement, not once in this record does Nielsen indicate an actual desire to do any- thing but retain the Parcel B for which she originally applied. Nielsen consistently opposed Roehl's allotment amendment from the time she was notified of it. Just weeks prior to the relinquishment, a memorandum to the Roehl file indicates that both Nielsen and Roehl were adamantly opposed to a negotiated agreement. (Memorandum to Roehl file by Rory Spurlock, dated Aug. 14, 1990.)

Nielsen's claim that she was given a parcel, in substitution for Parcel B, which was "100 percent inconsistent with [her] prior use and original intent," is substantiated by the facts. Likewise, her claim that "BLM knows this" is clear as well. The record contains no indication on her part, or in a BLM field examination, of an interest in the substituted plot of land, other than in the signed conflict resolution form, dated November 2, 1990. As noted above, BLM's field examiner Stephenson refused to agree that the proposed conflict resolution was justified based on the 1991 field examination. BLM was well aware that Nielsen had never desired the substitute plot and that it was not consistent with her prior use. Therefore, we find it unnecessary to conduct a hearing into whether Nielsen's relinquishment was "knowing and voluntary." We find that it was not.

Accordingly, we hold that the conflict resolution between Daniel Roehl and Shirley Nielsen dated November 2, 1990, and the consequent decision of BLM dated April 22, 1992, are contrary to law and without legal effect. BLM directed Nielsen and Roehl to enter into compulsory negotiations pursuant to section 905(b) of ANILCA, in lieu of procedural protections she was afforded by statute and principles of fundamental fairness. These omissions constituted a breach of the Department's legal and fiduciary duty to Nielsen to fairly adjudicate her application for Parcel B.

Based on the foregoing, we believe that the only correct course of action is to reverse all determinations subsequent to Judge Child's decision and to remand the case files to BLM with instructions to adjudicate Roehl's entitlement to the lands described within his amended application. It goes without saying that all protestants, including Nielsen, should be advised of the pendency of the adjudication and allowed to participate in this matter as deemed appropriate.

Accordingly, pursuant to authority granted to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded to BLM for further action consistent with this decision.

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Lisa Hemmer  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge